

## Message Text

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INFO OCT-01 ARA-06 ISO-00 SS-15 SP-02 EB-07 INR-07 /041 R

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E.O. 11652: GDS

TAGS: EFIN, EIND, HA

SUBJECT: DUPONT CARIBBEAN

1. SUMMARY. DURING RECENT ROUND OF GSP COUNTRY LIST DETERMINATIONS, SERIOUS QUESTIONS AROSE CONCERNING HAITI'S ELIGIBILITY FOR GSP IN VIEW OF DCI DISPUTE. WHILE ISSUE HAS FOR THE TIME BEING BEEN RESOLVED IN HAITI'S FAVOR, EXECUTIVE BRANCH IS OBLIGATED BY STATUTE TO KEEP DETERMINATIONS UNDER CONTINUING REVIEW, AND SIGNIFICANT PROGRESS ON DCI IS DESIRABLE TO ASSURE CONTINUING GOH ELIGIBILITY. ACCORDINGLY, DEPT BELIEVES YOU SHOULD AGAIN RAISE MATTER WITH GOH WITH A VIEW TOWARDS ESTABLISHING A PRACTICAL MECHANISM FOR RESOLVING THE DISPUTE. END SUMMARY.

2. SECTION 502(B)(4) OF THE TRADE ACT DENIES ELIGIBILITY FOR COUNTRIES WHICH HAVE EXPROPRIATED U.S. CITIZEN-OWNED PROPERTY AND ARE NOT ENGAGED IN GOOD FAITH NEGOTIATIONS TO-  
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WARD THE PROVISION OF-PROMPT, ADEQUATE AND EFFECTIVE COM-

PENSATION OR ARE NOT OTHERWISE TAKING STEPS TO DISCHARGE THEIR OBLIGATIONS UNDER INTERNATIONAL LAW. EXECUTIVE IS ALSO REQUIRED TO KEEP SUCH DETERMINATIONS UNDER CONTINUING REVIEW. WE HAVE THUS FAR TAKEN THE POSITION THAT THE INFORMATION AVAILABLE TO US AT THE PRESENT TIME CONCERNING DCI IS INSUFFICIENT TO PERMIT US TO DETERMINE WHETHER ACTIONS OF THE GOH CONSTITUTE "EXPROPRIATION# WITHIN THE MEANING OF SECTION 502 (B)(4) OF THE ACT, BUT WE MAY NOT BE ABLE TO MAINTAIN THIS POSITION INDEFINITELY. CLEARLY, WE WISH TO AVOID REACHING A POINT WHERE IT WOULD BE NECESSARY TO MAKE A DETERMINATION HAVING SUCH POTENTIALLY ADVERSE CONSEQUENCES FOR OUR RELATIONS WITH HAITI IF AT ALL POSSIBLE. ACCORDINGLY WE BELIEVE THAT FURTHER EFFORTS TO SEEK A RESOLUTION OF THE PROBLEM ARE ESSENTIAL.

3. DEPT OFFICERS MET WITH PIERSON AND HIS ATTORNEY IN SEPTEMBER AND DISCUSSED ISSUES WITH LAWYERS LAST WEEK. PIERSON INDICATED IN SEPTEMBER THAT HE AND COUNSEL WERE IN THE PROCESS OF PREPARING DCI'S FORMAL CLAIM AGAINST THE GOH. THEY INDICATED, HOWEVER, THAT THEY WOULD BE PREPARED TO PURSUE ANY OTHER CHANNEL FOR RESOLVING THE MATTER THAT MIGHT BE AVAILABLE, INCLUDING SUBMITTING THE QUESTION TO ARBITRATION OR ENGAGING IN DIRECT NEGOTIATIONS WITH THE GOH. RECENTLY, THEY HAVE INQUIRED AS TO THE STATUS OF OUR CONTACTS WITH THE GOH ON THE SUBJECT AND INDICATED THAT IF THERE IS NO PROSPECT FOR PROGRESS SOON, THEY WILL PRESS THE MATTER WITH MEMBERS OF THE CONGRESS. HOWEVER, THEY REITERATED THEIR WILLINGNESS TO PURSUE THE NEGOTIATION OR ARBITRATION ROUTE IF THE GOH WOULD BE WILLING TO DO SO.

4. (FYI: IT IS OUR UNDERSTANDING THAT DCI HAS TRANSFERRED TO TRANSILINEAR MOVEABLE PROPERTY STILL AT THE CONSTRUCTION SITE. HOWEVER, THE TRANSFER AGREEMENT PRESERVED DCI'S CLAIMS AGAINST THE GOH, AND DCI INTENDS TO CLAIM COMPENSATION FOR DAMAGES RESULTING FROM THE GOH'S PREVENTING DCI FROM REMOVING THE PROPERTY FROM THE ISLAND WHICH SIGNIFICANTLY DIMINISHED THE VALUE OF THAT PROPERTY. DCI ALSO CLAIMS THAT IT IS DUE COMPENSATION FOR ITS RIGHTS UNDER ITS CONTRACT WITH THE GOH. THE HAITIAN COURT APPARENTLY HELD THAT THE CONTRACT WAS PROPERLY CANCELLED BUT THE COURT DID CONFIDENTIAL

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NOT ADJUDICATE THE ISSUE OF WHETHER THAT CANCELLATION GAVE RISE TO A CLAIM FOR COMPENSATION FOR THE LOST CONTRACT RIGHTS, SINCE THAT ISSUE WAS NOT PRESENTED TO THE COURT. END FYI)

5. CONSEQUENTLY, DEPT REQUESTS THAT YOU RAISE THE MATTER WITH APPROPRIATE GOH OFFICIALS ALONG THE FOLLOWING LINES:

(A) U.S. LEGISLATION CONTAINS A VARIETY OF PROVISIONS APPLICABLE TO COUNTRIES WHICH HAVE EXPROPRIATED OR TAKEN SIMILAR ACTIONS AGAINST THE PROPERTY OF U.S. CITIZENS WITHOUT THE PAYMENT OF JUST COMPENSATION. WHILE THE USG HAS NOT TAKEN A POSITION ON THE MERITS OF THE DCI CASE, WE BELIEVE IT RAISES SERIOUS QUESTIONS WITH RESPECT TO THE APPLICABILITY OF THESE STATUTES, PARTICULARLY IN CONNECTION WITH SECTION V OF THE TRADE ACT OF 1974. GSP IS NOT PER-

MITTED FOR COUNTRIES WHICH HAVE TAKEN EXPROPRIATORY ACTS AGAINST U.S. CITIZENS AND FAILED TO TAKE APPROPRIATE STEPS TO PROVIDE COMPENSATION AS REQUIRED BY INTERNATIONAL LAW.

(B) USG WISHES TO AVOID ANY POSSIBILITY THAT WHAT SHOULD BE A MINOR MATTER MIGHT DEVELOP INTO AN ISSUE WHICH COULD AFFECT THE GOOD AND PRODUCTIVE RELATIONS BETWEEN OUR TWO GOVERNMENTS. WE WOULD, THEREFORE, PROPOSE THAT EFFORTS BE MADE TO FIND A MUTUALLY SATISFACTORY SOLUTION.

(C) IN GENERAL, WE BELIEVE THAT THE BEST MEANS OF RESOLVING DISPUTES OF THIS NATURE IS THROUGH DIRECT NEGOTIATIONS BETWEEN THE PARTIES CONCERNED, OR THROUGH SUBMISSION OF THE DISPUTE TO AN IMPARTIAL ARBITRATOR. WE UNDERSTAND THAT THE ORIGINAL CONTRACT BETWEEN THE GOH AND DCI INCLUDED A PROVISION FOR IMPARTIAL ARBITRATION OF DISPUTES. WE RECOGNIZE THAT THE PARTICULAR ARBITRATION PROCEDURE SPECIFIED IN THE CONTRACT CANNOT BE APPLIED. (THE CONTRACT CALLED FOR SUBMISSION OF DISPUTES TO THE INTERNATIONAL COURT OF JUSTICE, BUT THE ICJ IS NOT EMPOWERED TO HEAR CASES BETWEEN A PRIVATE PARTY AND A GOVERNMENT.) HOWEVER, IF A PRACTICAL MEANS FOR CARRYING OUT THE CLEAR INTENT OF THE PARTIES TO SUBMIT DISPUTES TO ARBITRATION COULD BE DEVELOPED, IT WOULD, IN OUR VIEW, PROVIDE AN EXCELLENT CONFIDENTIAL

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MECHANISM FOR PUTTING THE ENTIRE MATTER TO REST.

(D) IN THIS CONNECTION, WE UNDERSTAND THE POSITION OF THE GOH THAT THE ISSUE OF CANCELLATION OF DCI'S CONTRACT HAS BEEN RESOLVED BY THE HAITIAN COURTS AND CANNOT BE REOPENED. HOWEVER, WE ALSO UNDERSTAND (FYI: FROM HAITIAN LAWYERS CONTACTED BY JACK MARQUEZ. END FYI) THAT THE COMPENSATION ISSUE WAS NOT BEFORE THE HAITIAN COURTS, AND IS THEREFORE AN OPEN MATTER UNDER HAITIAN LAW. THUS, THIS ISSUE COULD BE SUBMITTED TO ARBITRATION WITHOUT PREJUDICE TO HAITI'S POSITION REGARDING THE FINALITY OF THE DECISION OF ITS COURTS. ACCORDINGLY, THERE IS A RATIONALE FOR PUBLIC JUSTIFICATION BY THE GOH OF A DECISION TO GO TO ARBITRATION. MOREOVER, A DECISION TO GO TO ARBITRATION COULD BE VIEWED PUBLICLY AS A DEMONSTRATION OF THE GOH'S CONFIDENCE IN THE

LEGITIMACY OF ITS ACTIONS IN THIS CASE.

(E) ACCORDINGLY, WE WOULD SUGGEST THAT THE GOH CONSIDER AGREEING TO SUBMIT THE ISSUE OF COMPENSATION TO IMPARTIAL ARBITRATION. (THE INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES OR THE INTER-AMERICAN ARBITRATION COMMISSION ARE REPUTABLE ORGANIZATIONS WHICH MIGHT BE USED FOR THIS PURPOSE.) SUBMITTING THE ISSUE TO ARBITRATION WOULD FULLY

SATISFY ALL REQUIREMENTS OF U.S. LEGISLATION AND WOULD LAY THE MATTER TO REST ONCE AND FOR ALL.

(F) FINALLY, WE WISH TO EMPHASIZE TO THE GOH THAT WE ARE NOT TAKING ANY POSITION ON THE MERITS OF THE CASE AND ARE SIMPLY SUGGESTING A POSSIBLE PROCEDURE FOR ELIMINATING DCI AS A POTENTIAL PROBLEM FOR OUR TWO GOVERNMENTS. ANY THOUGHTS THAT THE GOH MIGHT HAVE AS TO HOW TO RESOLVE THE MATTER WOULD BE APPRECIATED.

6. FYI: GOOD FAITH NEGOTIATIONS BETWEEN PIERSON AND THE GOH ON THE COMPENSATION ISSUE WOULD ALSO CONSTITUTE "APPROPRIATE STEPS" UNDER U.S. LAW. PIERSON IS PREPARED TO NEGOTIATE AND TO MAKE A NEW OFFER TO THE GOH. HOWEVER, WE CONSIDER NEGOTIATIONS TO BE FAR LESS LIKELY THAN ARBITRATION TO LEAD TO A RESOLUTION OF THE ISSUE, AND HENCE BELIEVE IT IS IN OUR INTEREST TO PRESS STRONGLY FOR CONFIDENTIAL

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ARBITRATION AT THE OUTSET. SHOULD THE GOH FIRMLY REJECT THE CONCEPT OF ARBITRATION, YOU MIGHT SUGGEST GOOD FAITH NEGOTIATIONS AS THE NEXT BEST ALTERNATIVE. PIERSON REQUESTED THAT IN THE EVENT WE GO THE NEGOTIATIONS ROUTE, A DEPT OR EMBASSY OFFICER BE PRESENT AS AN OBSERVER. GIVEN THE PAST HISTORY OF THIS CASE, WE TEND TO CONCUR WITH PIERSON THAT AN OBSERVER WOULD BE USEFUL, IF FOR NO OTHER REASON THAN TO PROVIDE US WITH AN ACCURATE ACCOUNT OF WHAT TRANSPIRED. WE WOULD WISH TO MAKE CLEAR TO BOTH PARTIES, HOWEVER, THAT THE OFFICER WAS PRESENT ONLY AS AN OBSERVER AND NOT AS A NEGOTIATOR FOR EITHER SIDE OR AS A MEDIATOR. WE WOULD APPRECIATE YOUR THOUGHTS ON THE USEFULNESS AND FEASIBILITY OF HAVING AN EMBASSY OFFICER PRESENT AS AN OBSERVER. END FYI. KISSINGER

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## Message Attributes

**Automatic Decaptioning:** Z  
**Capture Date:** 01 JAN 1994  
**Channel Indicators:** n/a  
**Current Classification:** UNCLASSIFIED  
**Concepts:** GENERALIZED PREFERENCES (TARIFFS), MEMBER ADMISSIONS  
**Control Number:** n/a  
**Copy:** SINGLE  
**Draft Date:** 06 JAN 1976  
**Decaption Date:** 28 MAY 2004  
**Decaption Note:** 25 YEAR REVIEW  
**Disposition Action:** RELEASED  
**Disposition Approved on Date:**  
**Disposition Authority:** powellba  
**Disposition Case Number:** n/a  
**Disposition Comment:** 25 YEAR REVIEW  
**Disposition Date:** 28 MAY 2004  
**Disposition Event:**  
**Disposition History:** n/a  
**Disposition Reason:**  
**Disposition Remarks:**  
**Document Number:** 1976STATE002286  
**Document Source:** CORE  
**Document Unique ID:** 00  
**Drafter:** MGKOZAK  
**Enclosure:** n/a  
**Executive Order:** GS  
**Errors:** N/A  
**Film Number:** D760003-1220  
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**Locator:** TEXT ON-LINE, ON MICROFILM  
**Office:** ORIGIN L  
**Original Classification:** CONFIDENTIAL  
**Original Handling Restrictions:** STADIS  
**Original Previous Classification:** n/a  
**Original Previous Handling Restrictions:** n/a  
**Page Count:** 4  
**Previous Channel Indicators:** n/a  
**Previous Classification:** CONFIDENTIAL  
**Previous Handling Restrictions:** STADIS  
**Reference:** n/a  
**Review Action:** RELEASED, APPROVED  
**Review Authority:** powellba  
**Review Comment:** n/a  
**Review Content Flags:**  
**Review Date:** 09 APR 2004  
**Review Event:**  
**Review Exemptions:** n/a  
**Review History:** RELEASED <09 APR 2004 by ElyME>; APPROVED <27 OCT 2004 by powellba>  
**Review Markings:**

Margaret P. Grafeld  
Declassified/Released  
US Department of State  
EO Systematic Review  
04 MAY 2006

**Review Media Identifier:**  
**Review Referrals:** n/a  
**Review Release Date:** n/a  
**Review Release Event:** n/a  
**Review Transfer Date:**  
**Review Withdrawn Fields:** n/a  
**Secure:** OPEN  
**Status:** NATIVE  
**Subject:** DUPONT CARIBBEAN  
**TAGS:** EFIN, EIND, HA  
**To:** PORT AU PRINCE  
**Type:** TE  
**Markings:** Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 04 MAY 2006